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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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No. 518

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ROBERT E. DINEEN, SUPERINTENDENT OF INSURANCE OF  
THE STATE OF NEW YORK, AS LIQUIDATOR OF NEW YORK  
INDEMNITY COMPANY,

*Petitioner,*

*vs.*

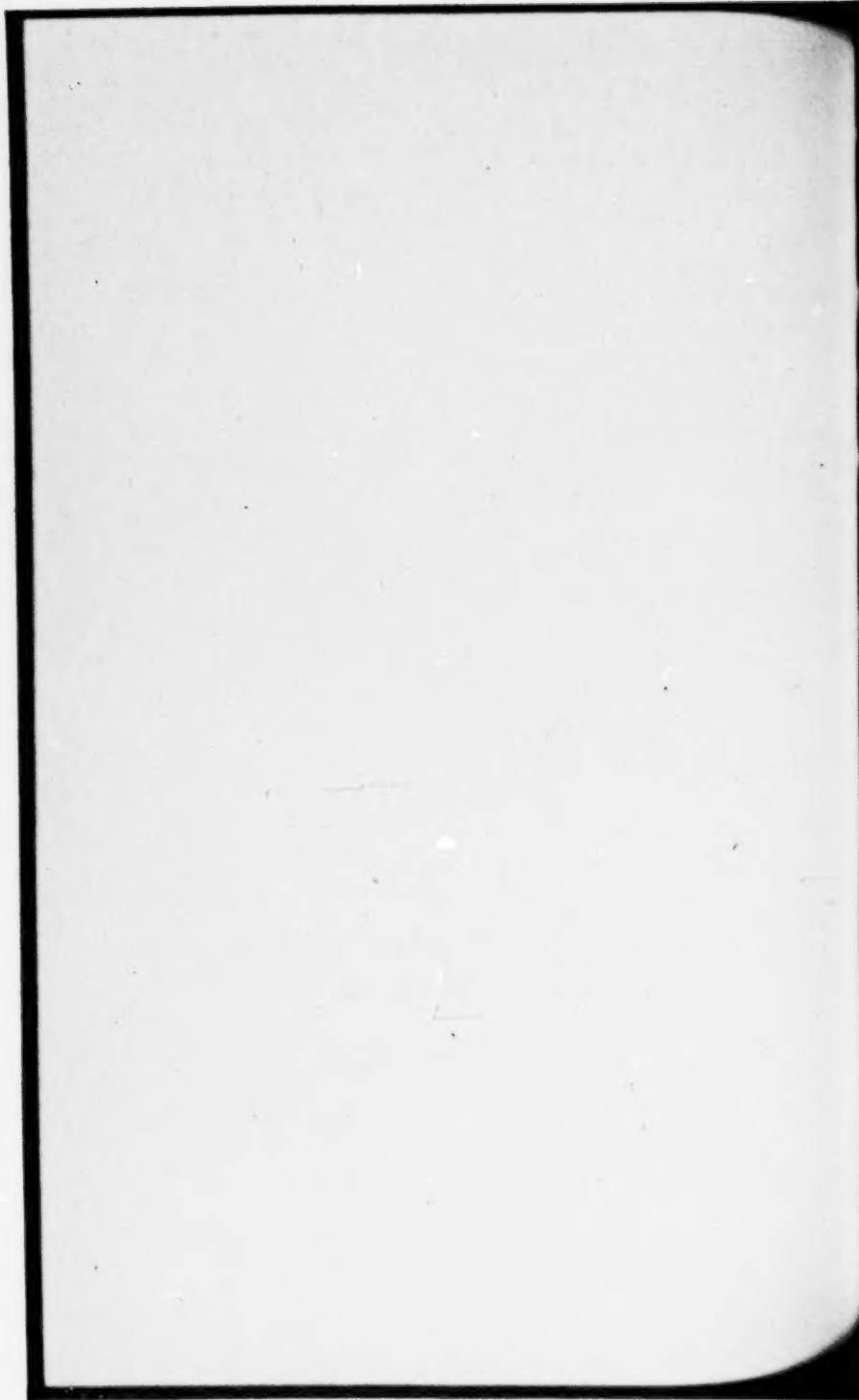
THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS

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The petitioner, Robert E. Dineen, Superintendent of Insurance of the State of New York, as Liquidator of New York Indemnity Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in the above entitled case.

**Opinions Below**

The opinion of the Court of Claims and the findings of fact appear at R. 9-24 and are reported in — Ct. Cls. —, — F. (2) —.

### **Jurisdiction**

The judgment of the Court of Claims was entered June 2, 1947 (R. 24). Motions for new trial filed on August 1, 1947 (R. 24) were denied on October 6, 1947 (R. 25). Jurisdiction herein is invoked pursuant to Section 3, Chapter 229, of the Act of February 13, 1925, 43 St. 939; 28 U. S. C. A. 288.

### **Questions Presented**

The questions presented are whether the contractors remain liable for liquidated damages when it appears

Under Article 3: (a) the government changed the scope of the work from the construction within 150 days of certain work as the useful part or link of a highway system into a construction with no beginning or end, and thereby isolated and useless because of acts of the government in not providing the construction of additional necessary links of the highway, thus removing all circumstances relative to damages.

(b) in the beginning of the timely diligent performance of their right to proceed required of the contractors subject to summary government termination if same did not insure or obtain due completion, the government participated for 60 days, or 40% of the contract time, in and consented to total failure of contractor diligence or performance by not affirmatively terminating the contract, and, instead, by reminding the contractors of their liability for liquidated damages under Article 9 for delay and urging them to proceed for that reason.

Under Article 16: the government within the 150 days voluntarily defaulted in its liability to pay due monthly progress estimates, thereby terminating the contract by the resulting creation of the right of election in the contractors either to abandon further performance or to proceed upon

their own resources relieved of all liquidated damages as provided in Article 9 and subject only to the duty to perform in a reasonable time, and else to respond in actual damages.

Under Article 9: (a) Whether the delays, involved in the initial 60 days of non-diligence acquiesced in by the government, in the 31 days of performance in October affected by the admitted non-payment of due monthly estimates, and in the 13 days of favorable weather conditions admittedly unavailable for performance because of the stop order and refusal to pay estimates, a total of 104 days constitute substantial delays by acts of the government excusable under Article 9.

(b) Whether the refusal to pay monthly estimates as a breach of Article 16 terminated the contract to the extent of the liability for liquidated damages.

(c) Whether the elimination of the timely element of performance and the final lack of timely or any use for the completed work, or either, as creating no damages for untimely completion, relieved of the liquidated damages.

(d) Whether the \$9,300 assessment is penal under the facts of the case.

Under each Article:

Whether the decision below upholding the original contract and assessed liquidated damages conflicts with settled precedents.

### **The Contract Provisions**

These, being Articles 3, 9 and 16 to the extent material, are excerpted from the Exhibit contract and set forth in annexed appendix.

### **Statement**

The material facts stipulated by the parties and incorporated in findings of the Court below, are not in dispute.

In 1928, the Interior Department, relying upon large available appropriations, contracted for numerous improvements in the several National Parks to be completed in designated periods of time so as to fit into the projected pattern of the park development. The contract herein with the contractors and surety, for work in the California Sequoia National Park, is similar to contracts in other parks (1) and was the grading of a portion of a park highway system for a contract price of \$91,365.88 within 150 calendar days computed as between May 21 to October 18, 1928 and subject, so far as is here material to provisions of Articles 3, 9 and 16 of the Standard Government Contract respectively (3) authorizing the contract officer to make changes in drawings and specifications or the scope thereof, (9) authorizing the government, if the contractors fail or refuse to proceed with diligence necessary to insure its completion in the contract time, or any extension, or fail so to complete the work, to terminate the contractor right to proceed, and to complete the contract with the contractor equipment, or otherwise, at the expense of the contractors and surety, and if the government does not terminate the right of the contractor to proceed the contractors shall continue the work in which event actual damages for the delay will be impossible to determine, and, instead, the contractor shall pay an agreed sum (\$100 a day herein) as liquidated damages for each calendar day of delay until completion or acceptance of the work, provided that the right to proceed shall not be terminated nor liquidated damages charged because of unforeseeable delays including but not restricted to unusually severe weather, acts of the government, etc., and (16) that the government shall make partial payments to the contractors as the contract progresses at the end of each calendar month, or as soon thereafter as practicable on estimates made and approved by the contracting officer, subject to



retention of 10% of the estimate until final completion and acceptance.

By changes in its scope, under Article 3, the government reduced the contract price to ~~\$43,483.36~~ <sup>\$47,882.52</sup> and by reason of the situations hereafter stated, the contractors did not complete the work until August 20, 1929, whereupon the government assessed and collected \$9,300 from the final payment of \$12,694.42, as liquidated damages accrued in alleged 93 calendar days of unexcused contractor delay. The net loss to the surety is stated, in the petition (R. 5), as \$139,591.63, and, in Finding 19, as in excess of \$9,300.

Pursuant to Special Law 226 (101 Ct. Cls. XIX) conferring jurisdiction upon the Court below to hear, determine and render judgment upon the claim for remission of said liquidated damages, as presented by plaintiff as statutory liquidator of the insolvent surety, the action therefor was instituted below, duly heard and the petition ordered dismissed.

The petition below, original (R. 1-6) and Amended (R. 6-8) sought remission upon the grounds, First, that non-completion within the ~~120~~ <sup>150</sup> days resulted in no damage to the government, and completion thereafter caused no damage and was without liability for liquidated damages, and, Second, that breach of the contract by the government terminated all liability for liquidated damages as provided in Article 9.

The government for defense sought to confine the performance to the contract to the original 150 days, with no extension of time, involving only a nominal breach in the refusal to pay the progress estimates, and so subject to liquidated damages for each unexercised calendar day of delay. The conclusion of the opinion below (R. 23-4) was that the government, probably entitled to terminate the contract because of the contractors tardiness in perform-

ance, did not terminate the contract by failing to make due monthly progress payments and by its shut down order, but only issued a suspension order, after which the contractors resumed and finished the work, so that the contract, including the liquidated damage provision remained in effect. In so deciding the opinion distinguishes *United States v. American Surety Company*, 322 U. S. 96, 88 L. Ed. 1158, as not applicable because therein the government actually terminated the contract. The opinion does not pass on the delays permitted or created by the government, and refused to consider the alleged penalty aspect of the \$9,300 in reference to the \$47,882.52 final contract price on the ground that whether or how much the government was damaged was unknown.

Preliminary to the opinion conclusion the Court below made findings of fact as follows:

From Finding 14—The contract when completed provided a piece of road of no useful value in a highway system until or unless the government thereafter made it viable at its one end by erecting three bridges and at the other by installing 29 miles of additional road demonstrating the government delay in filling in the highway pattern with other improvements made timely completion immaterial and divested untimely completion of every aspect of damages whether actual or undeterminable.

From Finding 6—Between May 21st and July 21st, during 60 days, or 40%, of the contract time, the government took no steps to terminate the right to proceed while the contractors entirely failed to proceed with any performance, and instead—“*the defendant's officers in charge of the project urged the contractors to proceed and called their attention to the contract provision relative to liquidated damages.*” (Quoted from Finding, R. 12)—demonstrating delay amounting to waiver of timely performance or breach terminating the contract.

From Finding 10—The progress estimate due and payable for September under Article 16, was \$4,980.43 and subsequently for October was \$18,971.93 exclusive of alleged damages.

From Finding 8—The appropriations were so exhausted on October 1st that the Interior Department was obliged to shut down all work unless contractors were willing to elect to proceed thereafter upon their own resources, whereupon the District Engineer so advised the contractors, offering to make prompt progress vouchers for bank discount by them and concluding—*“Wire at once whether you prefer continue construction or wish me to issue shut down order.”* The qualified reply was: *“We will attempt to go ahead and finance the above jobs as long as we can raise funds to do so. In the event it should develop that we cannot ourselves finance the same, we will at once ask you to issue shut down order”*. After performing to the extent of their resources through October, the contractors advised on October 30: *“We are no longer able to finance—unless we can at once receive from the government all payments due in accordance with the terms of our contracts”* \* \* \* and received reply: *“In view of the fact you can no longer provide the necessary finances, you are hereby authorized to suspend operations—this is to be effective November 1, 1928.”* (Quotations from Finding, R. 13-4.)

From Finding 12—Of the stop order, the District Engineer advised the contractors on December 7: *“This authority to suspend operations is to be classed as a delay due to an act of the government as mentioned in Article 9 of the contract”*. (Quotations from Finding, R. 15.)

Parenthetically, the stop order of November 1 thus renders Finding 20 (R. 21) immaterial that—*“weather conditions would have permitted them (the contractors) to work up to November 13, 1928, when the weather would have re-*

quired a stoppage of all work for the winter season; also, in the aspect of delay, the government waiving any diligence in the first 60 days and not paying estimates in the 31 days of October contradict Finding 21 (R. 21) that—“*The contractors’ delay from the commencement of the work to the completion date, October 18, was attributable to themselves.* (Quotations from Findings).

Parenthetically further, the Court below, while thus placing all delays entirely against the contractors, makes Finding 20 (R. 21) that, on October 31st measured by the \$91,000 contract the contractors had completed only 37%, but measured by the final \$48,000 contract had completed 71%, and then, nevertheless, states in the opinion (R. 23) only 37% of the contract was completed—“*though their contract time had already expired on October 18.*”

From Finding 12—The government ignored the contractor requests of December 10: “*that the contract be terminated—the contractors be paid the unit price on account of all work performed to date of the shut-down order, with a definite understanding that the contractors were not required to return and complete the work.*” (Quoted from Finding, R. 16.)

From Findings 14-18—In March and April, 1929, the contractors advised they were returning to complete the work, and asked a 120-day extension of time, pointing out their completed work would be useless pending government construction of ~~their~~ bridges at one end and 29 miles of road at the other end (R. 17-18), by replying they were notified to resume work June 1, including the statement: *Your contract time will be resumed as of that date.* (Quoted from Finding, R. 18.)

The contract was completed August 20, 1929 (R. 18) with a total elapsed time of 456 days, of which 212 days as involving severe winter weather, and one day for other reasons were excused, and the elapsed contract days were so

reduced to 243 days (R. 19-20), showing an alleged delay of 93 days beyond the contract time, with deduction of \$9,300 as liquidated damages which was ~~returned~~ from the final payment of \$12,694.42 made to the contractors. *retain return*

### **Specifications of Error to Be Urged**

The Court of Claims erred:

1. *As to the delays permitted or provoked by the Government affecting timely performance or being breaches of the contract.*

(a) By ignoring the government acquiescence in entire lack of diligence or performance by the contractors in the first 60 days of contract time, being delay of the government contrary to the contract intent.

(b) By ignoring delay to the contractors by the government acts in refusing in and until expiration of the contract time to pay the due progress estimates, conceded by the offer of vouchers for discount to be essentials of timely performance, being delay in the 31 days of October.

(c) In disregarding and creating conflict of decision with settled precedents that delays have the aspect of termination, and, further, if attributable to both parties relieve of liquidated damage liabilities.

2. *As to termination of the contractor right to proceed by government breach of the contract:*

In holding the government default in not paying due progress estimates did not breach and terminate the contract so as to relieve of liquidated damages as provided in Article 9:

(a) By ruling the government escaped such default by imposing upon the contractors the choice to proceed upon their own resources.

(b) By ruling the stop order was a suspension of the original contract instead of the substituted qualified contractor election to proceed upon and only to the extent of their own resources.

(c) In disregarding and creating conflict of decision with settled precedents that default in payment of progress estimates effectively breaches the contract and terminates any liquidated damage liability and that the election of the contractors to proceed despite such default upon their own resources substitutes the liability, if any, only for actual damages.

### 3. *As to the penal effect of the liquidated damages.*

In avoiding decision thereof by disclaimer of knowledge —“*whether the government was damaged by the delay, nor, if so, how much*” (quoted from opinion R. 24) notwithstanding Finding 6 shows toleration of 60 days initial delay, Finding 8 shows creation of 31 days of delay and Finding 13 shows completion represented a useless stretch of highway with neither a beginning or an end and affording no basis for damages for its non-completion under any circumstances.

### **Reasons for Granting the Writ**

1. The instant case involves no large amount but, unless corrected, its principles promote confusion and conflict in the administration of the provisions of government contracts. The controversy turns upon the second Paragraph of Article 9 as lately interpreted in *United States v. American Surety Company*, 322 U. S. 96, 88, L. Ed. 1158, wherein it appeared the government extended the time of a contract, and thereafter terminated the contract for lack of diligent performance when the work was unfinished for thirteen months and wherein its claim for liquidated damages alleg-

edly accrued during the thirteen months was denied by this court, saying:

That right (to liquidated damages under the second part of Article 9) is conditioned upon the government not terminating the contractor's right to proceed. Where there is such termination . . . the right to liquidated damages disappears.

Article 9 makes the government right to liquidated damages precisely dependent upon the stated condition precedent—"If the government does not terminate the right of the contractor to proceed"—which condition, the opinion holds, cannot be construed into a continuing condition although it enables the contractor to escape the imposition of liquidated damages by voluntary abandonment or by provoking government termination or although, as said in the opinion:

The government contracting officers in turn would be induced to allow the contractor to proceed to completion despite unexcusable delays so as not to forfeit mounting liquidated damages, thus precluding prompt completion and occupancy of needed structures.

Such action by the contracting officers precluding timely performance will not find approval anywhere when plainly apparent because, by defeating the objective of timely completion, it dissipates the existence of any damages as the result of untimely completion, and thus destroys the consideration that originally supported the provision for liquidated damage.

Yet this case baldly and plainly presents the government officers allowing the contractors to fail or refuse performance until 60 days or 40 per cent of the contract time had elapsed before they began performance. It is admitted, in such interval instead of termination, "*the defendants*



*officers in charge of the project urged the contractors to proceed and called to their attention the contract provision for liquidated damages"* (Finding 6, R. 12).

The decision below standing as final will approve official action that allows inexcusable delays and precludes prompt completion in the effort to obtain liquidated damages. The contractors should stand excused of the 60 days as delays, as "*due to unforeseeable causes*" and "*without the fault or negligence of the contractor*", since it cannot be presumed the government officers would so subvert and undermine the purpose of the contract.

Such 60 days of procrastination in delay become a breach for Green, J., in *Carroll v. United States*, 67 Ct. Cls. 513, 518, plainly states the difference:

The true principle is that the acts of the government or its omissions to act, even though they caused delay, will not make the government liable in damages unless they constitute also a breach of the contract express or implied.

It is submitted consideration hereof in further amplification of the *American Surety* opinion is just and proper.

2. The opinion below distinguishes the present case from *American Surety* on the ground that herein there was no termination by the refusal to pay the progress estimates since the contractors were invited and chose to proceed with performance upon their own resources. This conflicts with settled decisions by its disregard of the rights created by the refusal to pay the progress payments. In the sister cases of *Schuler* and *McDonald v. United States*, 85 Ct. Cls. 631, and *Joplin v. United States*, 89 Ct. Cls. 345, the contractors were performing similar contracts in other National Parks and on October 1st were notified the government was defaulting upon its progress payments. Each contract provided \$25.00 a day as liquidated damages. Each



contractor proceeded on his own resources, subsequently received stop orders effective November 7th and October 15th, and subsequently resumed under extensions of time and incurred liquidated damages in such extensions. Each subsequently collected damages for the breach of contract created by the government default as to due progress payments. Cf. *Myerle v. United States*, 33 Ct. Cls. 1, 25, and decisions therein cited; also *Suburban Contracting Co. v. United States*, 76 Ct. Cls. 533, 545, and *Commercial Casualty Co. v. United States*, 83 Ct. Cls. 376, in which the refusal to pay estimates is declared a breach that eliminates the item of liquidated damages.

The decision below conflicts with decision in holding after the admitted default and breach the contractors continued the contract fully in effect by choosing to proceed upon their own resources at the government invitation.

The situation is otherwise, *Phillips & Colby Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341, decides:

Where plaintiffs had partly performed, and the defendant failed to do its corresponding duty under the contract, and defaulted on a payment due, they are not required to go on at the hazard of a further loss.

Re *Walker M. & A. Co.*, 32 F. (2) 825, 827, concisely states the resulting situation:

"Where one party to a contract fails to perform a condition which justifies the other party in refusing to perform, and yet the other party does not expressly abandon or repudiate the contract, the latter has a choice of two courses—to go on with the contract, or to stop performance. If he chooses one, he loses the right to the other. The two are inconsistent, and he may not maintain both.

"Election involves no requirement of mutual assent. It is the privilege of the injured party alone \* \* \*. But if the election has once been made, the contract

must be completed unless there has been an additional breach by the other party."

The fact is the contractors chose to proceed only qualifiedly subject to the exhaustion of their available resources and the government agreed and gave the stop order when their resources were exhausted. The stop order terminated the limited performance of the contractors with their own resources. As the breach and termination put the liquidated damage obligation out of the contract, consequently, the government, by reliance on the subsequent relations, cannot nominalize the breach unless therefrom there appears actual agreement for reinstatement of the liquidated damage obligation. It cannot be implied for as held in *Tobin v. United States*, 103 Ct. Cls. 480:

If we give any head at all to the idea that its provision for liquidated damages should be narrowly construed, we should hold, as we do, that there was no agreement for liquidated damages in the situation which occurred.

3. The case below has no definite basis to support liquidated damages and hence same are submitted penal in effect.

The sum of \$100 a day was applicable to a \$91,000 contract in the beginning and in the end to a \$48,000 contract, and yet was fixed at \$25 a day in the similar Schuler contract and also in the Joplin contract for \$306,000.

Any original conception of the propriety of liquidated damages disappeared in the subsequent 60-day initial and subsequent 31- and 13- day delays consented to and created by the government and in the evident uselessness of the contract work when completed.

In these aspects *Schmoll v. United States*, 91 Ct. Cls. 1, 28, is submitted decisive:

"In several cases we have held where delays are caused by both parties to the contract the court will not

attempt to apportion them, but will simply hold the provision of the contract with reference to liquidated damages will be annulled.

. . . . .

“Penalties are not favored by the courts, when as in the case before us, it does not appear that any actual damages have been sustained. They are ‘enforced only after the demandant therefor has shown that he himself has strictly complied on his part with all the contract requirements prerequisite to such enforcement.’ *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867, 874. In *United States v. United Engineering Co.*, 234 U. S. 236, 242, it was held that:

“ . . . when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages . . . for each day’s delay . . . the other party must not prevent the performance of the contract within the stipulated time.

“and in such a case, though the completion of the work is delayed by the fault of the contractor, liquidated damages are waived.”

Turning to the penal aspect alone, *Wise v. United States*, 249 U. S. 361, 365, states the applicable rule:

“ . . . that in such cases courts will endeavor by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment of a designated sum, or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects.”

Upon application of the above rule, the reaction to the present situation, that tends to capitalize *damnum absque injuria*, is submitted to be as held in *Kothe v. Taylor Trust*, 280 U. S. 224, 74 L. Ed. 382:

But agreements to pay fixed sums plainly without reasonable relation to any probable damage which

may follow a breach will not be enforced. This circumstance tends to negative any notion that the parties really meant to provide a measure of compensation—"to treat the sum named as liquidated damages".

### **Conclusion**

For the reasons stated, it is respectfully submited that this petition for a writ of certiorari should be granted.

CAMDEN R. McATEE,  
*Attorney for Petitioner.*

**APPENDIX**

Contract Articles of Standard Form, being the material parts of the contract herein:

Article 3. *Changes*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly . . .

Article 9. *Delays—Damages*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes be-

yond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: . . .

Article 16. *Payments to contractors.*—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract.

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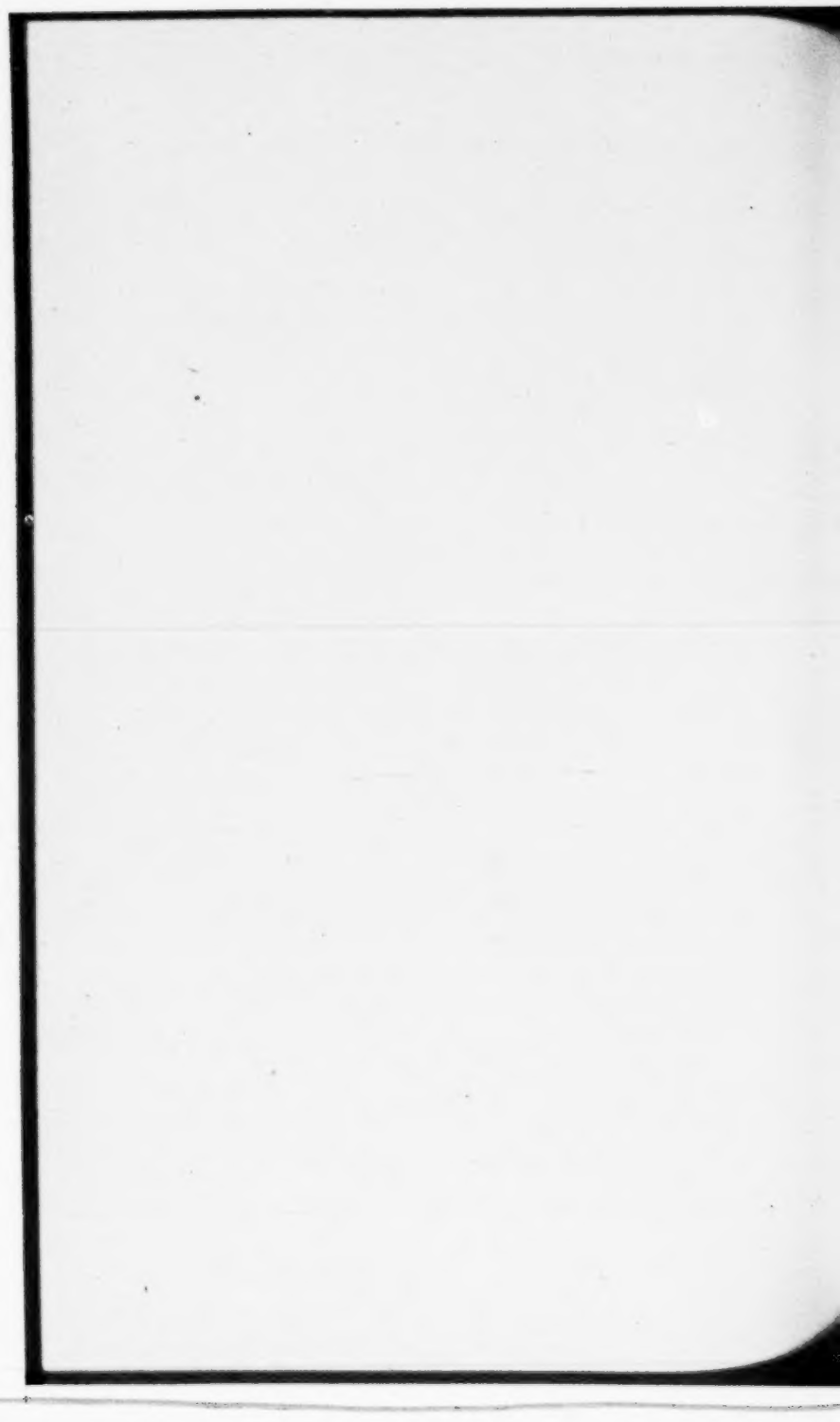
ROBERT E. DINEEN, Superintendent of Insurance of the  
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THE UNITED STATES.

—  
**PETITIONER REPLY TO THE GOVERNMENT  
OPPOSITION.**  
—

✓ CAMDEN R. MCATEE,  
*Attorney for Petitioner.*





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ROBERT E. DINEEN, Superintendent of Insurance of the  
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THE UNITED STATES.

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**PETITIONER REPLY TO THE GOVERNMENT  
OPPOSITION.**

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By this reply, petitioner, respectfully and briefly, would show lack of substance in the discussion of the Specifications of Error of the petition posed in the Opposition as its restatement of the Questions Presented.

Restatement 1. Whether the Government waived the provision for liquidated damages for delay in Section 9 of a standard form construction contract by its failure to terminate the contract because of the contractors' two-month delay in commencing work.

The Opposition states the petitioner contention that the entire non-performance of the contractor, in the first 60 contract days, required the government to terminate the contract is without support either in *United States v. American Surety Co.*, 322 U. S. 96, or in Article 9 of the contract.<sup>1</sup>

*Arguendo*, The Opposition recites as the alternatives under Article 9 that government termination of the contractor right to proceed entitles the government to complete performance with aid of others, and to charge the excess cost to the contractors, or, in case the government does not terminate and the contractor proceeds, to recover liquidated damages for each day of unexcused contractor delay beyond the specified date of completion.<sup>2</sup> This general statement is then modified by admission that the *American Surety Company* opinion holds all claims for liquidated damages are foreclosed by government termination of the contractor right to proceed, and by denial that the opinion holds the government is required to terminate; it then concludes it would be a strange rule of law to impose a duty to terminate the right to proceed as inclusive of termination of the alternative right to liquidated damages where Article 9 clearly provides for an election.

The argument is not relevant as the petition urges no such strange rule of law. The first specification of error invokes whether extensive delay admittedly permitted or provoked by the government amounts to waiver or breach of the contract provision for stated timely performance. The specification propounds definite error below in decid-

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<sup>1</sup> Article 9 appears on pp. 3, 11 of the Record, and p. 8 of the Opposition.

<sup>2</sup> The statement omits that Article 9 permits the contractor to escape all liability for liquidated damages not only in case of government termination by notice for lack of diligence or other breach by the contractor or by any breach by the government, but also where the contractor voluntarily abandons performance or provokes termination by the government. *American Surety Co.*, *supra*.

ing the right to liquidated damages continues in effect when it appears that, during 60 days in which the contractors entirely failed to proceed, the government, intending not to terminate the right to proceed, "*urged the contractors to proceed and called their attention to the contract provisions for liquidated damages,*"<sup>3</sup> meaning that "*the government contracting officers would \* \* \* allow the contractor to proceed to completion, despite unexcusable delays, so as not to forfeit mounting liquidated damages, thus precluding prompt completion and occupancy of needed structures.*"<sup>4</sup> The specification propounds not that termination was the government alternative, but that the evident government waiver of its right to procure timely performance relieved the contractors of liability in liquidated damages when subsequent performance was accepted and compensated.<sup>5</sup>

With such actual situation presented, the Opposition, and also the petition, seek further construction of the phrase in Article 9: "If the government does not terminate the right of the contractor to proceed." The Opposition seeks approval of the situation existing herein, notwithstanding the *American Surety* opinion shows such situation was forecast as possible and advanced as a government argument against the construction of the phrase as a condition precedent, which construction the *American Surety* opinion nevertheless accepted and approved. Alternatively, the Opposition seeks approval of a right of the government to assert and collect liquidated damages *in terrorem* not as compensation for any loss, but as a spur to effort.<sup>6</sup> As this

<sup>3</sup> Quoted from Finding 6 (Record p. 12) (Petition p. 6). The opinion below emphasizes the situation by saying (contextual insertions added): *It (the government) would probably have been entitled to do so (to terminate the contract) because of the contractors' tardiness in performance* (Record, p. 23).

<sup>4</sup> Quoted from *American Surety Company* opinion (Petition p. 11).

<sup>5</sup> *Phillips, etc. v. Seymour*, 91 U. S. 646, quoted p. 8 of Petition.

<sup>6</sup> Expressly denied in *Priebe & Sons v. United States*, 322 U. S. 406.

Court has rejected each assertion, the Opposition makes no substantial answer to the first specification of petitioner. It follows the disregard below of the *American Surety* decision requires grant of the petition.

Restatement 2. Whether the failure of the Government to make monthly progress payments, which resulted in a temporary suspension of work, relieved the contractors from liability for liquidated damages for other delays for which they were solely responsible.

The Opposition declares untenable the petitioner contention that government failure to make monthly progress payments and the resulting suspension of work "put the liquidated damage obligation out of the contract".<sup>7</sup> As the petitioner contention is incorrectly declared, the declaration is without substance.

The opposition Statement is that after the government failure on October 1st to make the monthly payments, the contractors financed their own operations until stopped on November 1st because their own resources were exhausted and the monthly payments were not received.<sup>8</sup> The Opposition contention that the return of the contractors to completion of the work after the stop order of November 1st, instead of the contractor refusal to proceed further because of the 13 day delay in November, points that the incorrect declaration, coupling failure to pay estimates and resulting suspension, is purposely presented to raise argumentative confusion. The confusion designs escape from settled precedent that the admitted government failure on October 1st to pay the estimates was the termination that "put the liquidated damage obligation out of the contract."<sup>9</sup>

<sup>7</sup> Correct statement of the petitioner contention is "*as the breach and termination put the liquidated damage obligation out of the contract*". (Petition p. 14.)

<sup>8</sup> Opposition, page 4.

<sup>9</sup> See pp. 12, 13 of Petition.

It follows the government, and not the contractors, would unilaterally keep alive only selected contract provisions, and that discussion of delays is not material where breach as termination has discharged liability of the contractors in liquidated damages for delays.

The Opposition offers no substantial objection to the petition argument in support of the second specification.

The second petitioner specification is error below in *holding* the failure and refusal of the government to pay the estimates did not breach and terminate the contract in relief from liquidated damages, in *holding* the government could require the contractors to proceed upon their own resources, and so escape the effect of its default, in *holding* the stop order suspended the original contract instead of the substituted performance of the contractors, and in *the consequent conflict with precedents*.

Restatement 3. Whether the Government is required to prove actual damages from delay in completion of the contract notwithstanding the contract provision that "the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages" a specified sum for each day of delay.

The specification is the penal effect of assessment of \$100 a day as liquidated damages, and is entirely different from the restatement.

The Opposition ignores the pertinent facts that the sum of \$100 a day as damages imposed for completion of a \$91,000 contract, was collected against a \$48,000 contract, and that only \$25 a day was imposed in similar contemporaneous contracts;<sup>10</sup> it also ignores that delays for 104 days embracing the 93 controversial days were the consequences

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<sup>10</sup> See pp. 12-13 of Petition.

of waiver and breach by the government;<sup>11</sup> it also ignores that the highway section 10 months after the completion date was entirely useless without bridges at one end or roadway at the other so that its delayed completion caused no interference or other damages.<sup>12</sup>

The Opposition is merely that this Court has upheld the validity of comparable liquidated damage provisions in decisions recently approved in *Priebe & Sons v. United States*, October Term 1947, No. 16, decided November 17, 1947, 322 U. S. 407.

Contrary to the Opposition contention that the provision is not significantly different, petitioner submits its examination is subject to the applicable rules quoted in the petition from the *Wise* and *Kothe* opinions,<sup>13</sup> and to the further later development of said rules in the *Priebe* opinion (*supra*). The latter opinion holds "*exaction of a punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust*," after considering the limitations of the exaction (parentical words inserted for contextual purposes) as follows:

It (the exaction) might, as respondent (the government) suggests have an *in terrorem* effect of encouraging prompt preparation for delivery. But the argument is a tacit admission that the provision was included not to make a fair statement of damages to be suffered but to serve only as an added spur to performance. It is well settled contract law that the courts do not give their imprimatur to such arrangements.

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<sup>11</sup> Inclusive of the 93 days charged to the contractors, there are 104 days of government delays which embrace 60 days of contractor failure of diligence waived by the government as covered by liquidated damages (Finding 6, R. p. 12) also 31 days in October when the contractors agreed to proceed upon their own resources and were hindered by non-payment of the due estimates, also 13 days in November when the contractors were without their own resources and unable to proceed without the estimates. (Finding 8, R. pp. 12-14.)

<sup>12</sup> Finding 14 (Record p. 17) (Petition p. 6).

<sup>13</sup> 249 U. S. 361, 365; 280 U. S. 224.



The intention at its insertion, called for by the *Wise* opinion, and its reasonable relation to any probable damage called for by the *Kothe* and *Priebe* opinions are the measures of the provision for liquidated damages. At insertion the necessity of prescribed timely completion was evidently lacking, else entire non-performance for 60 days of the 150-day period would not have been waived;<sup>14</sup> the necessity was again lacking 10 months after the completion date when the highway section was useless as without bridge approaches or necessary extensions at its ends.<sup>15</sup> Hence neither valid intention nor reasonable relation underlies the instant provision.

This issue of penal effect is of course material only while liability adjudged below for liquidated damages remains as subject to imposition.

Grant of the petition for cause shown on each specification is submitted proper primarily because of evident conflicts of decision.

Respectfully submitted,

ROBERT E. DINEEN,  
*Superintendent.*

By (s) CAMDEN R. McATEE,  
*Attorney for Petitioner.*

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<sup>14</sup> Note 3, *supra*.

<sup>15</sup> Note 12, *supra*.

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1947

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No. 518

ROBERT E. DINEEN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF NEW YORK INDEMNITY COMPANY, PETITIONER

v.

THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## **OPINION BELOW**

The opinion of the Court of Claims (R. 22-24) is reported at 71 F. Supp. 742.

## **JURISDICTION**

The judgment of the Court of Claims was entered on June 2, 1947 (R. 24). A motion for a new trial was overruled on October 6, 1947 (R. 24-25). The petition for a writ of certiorari was filed on January 6, 1948. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, and the Act of

March 16, 1944 (Private Law 226, 78th Cong., 2d Sess.) c. 99, 58 Stat. (Pt. 2) 960 (R. 9-10).

#### QUESTIONS PRESENTED

1. Whether the Government waived the provision for liquidated damages for delay in Section 9 of a standard form construction contract by its failure to terminate the contract because of the contractors' two-month delay in commencing work.

2. Whether the failure of the Government to make monthly progress payments, which resulted in a temporary suspension of work, relieved the contractors from liability for liquidated damages for other delays for which they were solely responsible.

3. Whether the Government is required to prove actual damages from delay in completion of the contract notwithstanding the contract provision that "the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages" a specified sum for each day of delay.

#### STATEMENT

This action was brought pursuant to special statutory authorization (Private Law 226 of March 16, 1944, c. 99, 58 Stat. (Pt. 2) 960) to recover an amount withheld by the Government as liquidated damages for delay in the perform-

ance of a standard form construction contract (R. 1-6, 9-10). The facts as found by the Court of Claims may be summarized as follows:

On May 12, 1928, the Government entered into a contract with Grunwald and Tudor, Inc., and Elbert Deffebach for the construction of a portion of the highway in Sequoia National Park for the sum of \$91,365.88, later reduced to the sum of \$47,882.52 as the result of modifications in the work to be performed (R. 10, 20).<sup>1</sup> The contract required the work to be commenced within ten days after receipt of notice to proceed and to be completed within 150 days from that date (R. 11). The contractors were to be liable for liquidated damages of \$100 per day for each day of delay in completion of the work unless such delay was "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor" (R. 11). Notice to proceed was received by the contractors on May 21, 1928, thus fixing October 18, 1928, as the contract completion date (R. 12). Work on the project was not begun, however, until July 21, 1928 (R. 12).

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<sup>1</sup> Petitioner here, the Superintendent of Insurance of the State of New York, is statutory liquidator of the New York Indemnity Company (R. 10). The Indemnity Company was the contractors' surety for the performance of the contract (R. 10). The completion of the contract was never taken over by the surety (R. 20). Payments thereon were made to the contractors (R. 20). The surety, however, had advanced substantial sums to the contractors and the contractors were under an obligation to, and did, turn over to the surety payments made by the Government (R. 20).

The contract provided for progress payments to be made at the end of each month, or as soon thereafter as practicable, on the basis of estimates made and approved by the contracting officer (R. 12). On October 1, 1928, however, the Government's district engineer in charge of the contract advised the contractors that because of the exhaustion of available funds it might be necessary to issue an immediate shutdown order unless the contractors preferred to finance their own work until a new appropriation should become available in December or January, in which event progress vouchers would be issued to permit bank discounting (R. 12-13). After financing their own operations for one month, the contractors were unable to continue without receiving the contractual progress payments and the district engineer authorized them to suspend operations effective November 1 (R. 13-14). On December 10, 1928, the contractors requested that the contract be terminated and that a settlement for work performed be made with their surety (R. 16). Funds for completion of the work were made available by Congressional appropriation on March 4, 1929, and on March 14 the contractors were paid for the work previously performed (R. 15). On March 7, 1929, the surety's engineer informed the contracting officer that completion of the contract had been placed in his hands and requested an estimate of the work to be completed and information "as to the possible time we might be able

to begin the work" (R. 16-17). On April 3, 1929, the contractors suggested that resumption of work before June 1 would be impracticable and requested an extension of time of 120 days after notification to resume work to complete the project (R. 17-18). The contractors subsequently were ordered to resume work on the contract as of June 1 and were advised that their contract time would be resumed as of that date (R. 18). Pursuant to this direction, work was resumed on the designated day and completed 81 days later on August 20, 1929 (R. 18).

The contractors were charged with 93 days of delay in the completion of the work and \$9,300 was deducted from the balance owed on the basis of the contract provision for the payment of \$100 liquidated damages for each day's delay (R. 19-20). Under the terms of the original contract, the work was to be completed within 150 days of May 21, 1928, namely, October 18, 1928 (R. 11, 12). Revisions in the design of the road and elimination from the contract of a bridge structure and approaches reduced the length of roadway under the contract from 2.65 miles to 1.96 miles and the contract price from \$91,365.88 to \$47,882.52 (R. 12). Nevertheless, the period for completion of the contract remained the same (R. 12). Although the completion date was October 18, 1928, the contractors had completed only 37 percent of the work by October 31, 1928



(R. 21).<sup>2</sup> Work was not suspended by the Government until November 1, 1928, two weeks after the date of completion (R. 14). The court below found that all delay from the commencement of the work to the original completion date of the contract, October 18, 1928, was attributable to the contractors (R. 21). Apart from the suspension order, weather would have required a stoppage of all work for the winter season after November 13, 1928, and the contractors would not have been able to complete the work by that time (R. 21). According to the contractors, resumption of work was not feasible, because of weather conditions, before June 1, 1929, when it was actually resumed (R. 17, 18).

A period of 456 days elapsed between the date of the beginning of contract time and the completion of the contract (R. 19). In computing liquidated damages, the 212 days between the time work was suspended on November 1 and ordered resumed on June 1, in addition to the 150 days

<sup>2</sup> The Court of Claims made the following findings with respect to the progress of the work (R. 21) :

Date (1928)	Estimated percentage of work completed	Percentage of contract time elapsed
July 1.....	0	40
August 27.....	5	63
September 25.....	14	83
October 31.....	37	108

allowed for completion, were deducted from the total elapsed time (R. 19-20). The Government's representatives therefore charged the contractors with 94 days' delay and assessed liquidated damages in the amount of \$9,400 (R. 19). The Comptroller General remitted one day's liquidated damages because about half of the contractors' working force was drafted for a period of two days in August, 1928, for the purpose of fighting forest fires, and the balance owing the contractors after deduction of \$9,300 of liquidated damages was paid (R. 20).

Petitioner's claim, as successor in interest to the contractors, that liquidated damages were improperly withheld was rejected by the court below and its petition dismissed on the ground that the contract, including the provision for liquidated damages, had remained in force (R. 24). In reaching its conclusion, the court pointed out that although the Government probably would have been entitled to terminate the contract "because of the contractors' tardiness in performance," it had not done so (R. 23). It further observed that, although the Government issued a suspension order, the contractors, "after the suspension, resumed performance and completed the work" (R. 24). The validity of the liquidated damage provision was upheld because of the difficulty of determining the extent of damages for delay (R. 24).

## ARGUMENT

1. Petitioner's argument that its delay in commencing performance required the Government to terminate the contract not only finds no support in *United States v. American Surety Company*, 322 U. S. 96, on which petitioner relies, but is directly contrary to the explicit terms of the contract. Article 9 of the standard Government form of contract, which was employed here, provides for two alternative courses which the Government may pursue in the event of contractor delays.<sup>3</sup> The Government is authorized to termi-

<sup>3</sup> Article 9 provides in part as follows:

*Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers \* \* \*.

nate the contractor's right to proceed, have the work performed by other means, and charge the contractor with any excess cost in the completion of the work. If the right to proceed is not terminated, the contractor is required to continue the work and be liable for liquidated damages in the amount agreed upon. In construing these provisions, the *American Surety Company* case holds only that the Government's election to terminate forecloses its right to recover liquidated damages. There is no suggestion in the opinion that the Government is required to terminate. And it would indeed be a strange rule of law that would impose a duty to terminate and to abandon the alternative right to liquidated damages in cases where the contract clearly provides for an election.

2. Petitioner's contention (Pet. 14) that the Government's failure to make monthly progress payments and the resulting suspension of work "put the liquidated damage obligation out of the contract" is equally untenable. Even assuming *arguendo* that the 13 days' delay attributable to the Government would have justified refusal of the contractors to proceed further under the contract (but see 3 Williston, Contracts (Rev. ed. 1936) § 877),<sup>4</sup> the fact is that the contractors did

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<sup>4</sup> The lower court found that, although the failure to provide funds caused the contractors to shut down on November 1, 1928, weather would have required termination of the work, in any event, by November 13, 1928, and that because of their

not elect this course but, on the contrary, continued to perform under the contract. In these circumstances, as stated by the court below, "the contract, therefore, remained in force, including its provision for liquidated damages" (R. 24). Obviously, the contractors could not unilaterally elect to keep alive only selected provisions of the contract. If the delays of the Government had prevented the contractors from completing performance by the contract date they would have been relieved of liability for liquidated damages for subsequent delays. *United States v. United Engineering Co.*, 234 U. S. 236. However, where timely performance is not prevented, "the fact that the Government's action caused some of the delay, presents no legal ground for denying it compensation for loss suffered wholly through the fault of the contractor[s]." *Robinson v. United States*, 261 U. S. 486, 488. See also *United States v. Bethlehem Steel Co.*, 205 U. S. 105.

3. Petitioner's final point that the liquidated damage provision is penal and should not be enforced is at odds with numerous decisions of this Court upholding the validity of comparable liquidated damage provisions in Government construction contracts. *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 120-121; *Wise v. United States*, 249 U. S. 361, 365; *Robinson v. United States*, 261 U. S. 486, 488; see *United States v. United Engi-*

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own delay the contractors would not have been able to complete the contract work by the latter date (R. 21).

*neering Co.*, 234 U. S. 236, 241. These decisions have recently received the approval of this Court. *Priebe & Sons v. United States*, October Term, 1947, No. 16, decided November 17, 1947. The provision for liquidated damages in the instant case presents no significant differences from those previously held enforceable.

#### CONCLUSION

The decision below is in accord with principles approved by this Court and further review is not warranted. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

	PHILIP B. PERLMAN,
	<i>Solicitor General,</i>
	H. G. MORISON;
Acting	Assistant Attorney General,
	PAUL A. SWEENEY,
	MORTON LIFTIN,
	<i>Attorneys.</i>

FEBRUARY 1948.

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U.S. - Supreme Court, U. S.

FILED

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CHARLES ELSBIE WOOLLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947.

—  
No. 518.  
—

ROBERT E. DINEEN, Superintendent of Insurance of the  
State of New York, as Liquidator of New York In-  
demnity Company, *Petitioner*,

v.

THE UNITED STATES.

—  
(Petition denied March 8, 1948)  
—

**PETITION FOR REHEARING.**

—  
CAMDEN R. McATEE,  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947.

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THE UNITED STATES.

---

**PETITION FOR REHEARING.**

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Rule 33, allowing a petition of rehearing after denial of the original petition for grant of writ of certiorari, supports further appeal to the discretion of the Court. Interest in such further presentation is shown in grants of petitions in cases after the denials both of the original petition and the first petition for rehearing.<sup>1</sup>

Additional reason for this second appeal to the discretion of the Court is the procedural limitations upon the

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<sup>1</sup> *Group No. 1 Oil Corporation v. Bass*, 283 U. S. 279. *Stone v. White*, 301 U. S. 532.

discretion applicable to cases from the United States Court of Claims. *Per Curiam*,<sup>2</sup> such discretion has been held to be limited by the procedure established for determination of claims against the United States. Consequently, only questions of law are to be presented because the findings of fact by the Court of Claims are equivalent to and of the same effect as the special verdict of a jury; a mixed question of law and fact is conclusively determined by a finding of fact unless the question is separable to disclose what and where is the mistake of law; the absence of the evidence underlying a finding so limits the consideration as to prevent the conclusion of fact from being overruled, subject to consideration whether the ultimate finding is so necessarily overcome by subordinate or circumstantial findings that the judgment is not substantial in point of law.

Within these limitations, petitioner respectfully invokes the discretion of the Court in inquiry as to the propriety of certiorari as centering around a substantial question of law where the findings of fact disclose three separate and distinct acts of the government, each tending to eliminate the liability for liquidated damages which the decision holds to be always in effect.

The contract obligation of the contractors was to proceed with diligence necessary to insure completion of the work within 150 calendar days from May 21, 1928, and thereby before October 18, 1928, and, if the right to proceed was not terminated by the government, to be liable in liquidated damages of \$100 for each calendar day of delay beyond the completion date not excused as the result of an act of the government or for other reasons not here material.<sup>3</sup> The contract obligation of the government was to make monthly payments of advance estimates to the contractors.<sup>4</sup>

<sup>2</sup> *United States v. Esnalt-Pelterie*, 303 U. S. 26.

<sup>3</sup> Article 9; Petition Appendix p. 17; R. p. 11.

<sup>4</sup> Article 16, Petition Appendix p. 18; R. p. 12.

Three ultimate findings of fact, unaffected by any subordinate findings, are submitted as relevant to the above contract provisions. The first point is the act of the government in waiver of timely and diligent performance before the contractors began their work.

Finding 6,<sup>5</sup> after stating the 150 days for the timely performance of the contract lay between May 21 and October 18, 1928, shows the government was more interested in the liquidated damages than in diligent timely performance, for it proceeds:

The contractors did not begin the contract work until July 21, 1928, when approximately 40% of the contract time had elapsed, although the defendant's officer in charge of the project, urged the contractors to proceed and called their attention to the contract provision relative to liquidated damages.

This position of the government is submitted to be a complete waiver of the timely performance upon which its right to liquidated damages would depend. Although timely completion of the contract was thus precluded in order not to forfeit mounting liquidated damages, the government allowed the contractors to proceed, despite their total failure to perform for 60 days of the contract time.<sup>6</sup>

The second point is the admitted default of the government upon its contract obligation to pay due monthly payments to the contractors as a termination of the contract and of all liability of the contractors for liquidated damages.

<sup>5</sup> R. p. 12; Petition p. 6. Derivative Finding 20, (R. p. 20), that from July 21st to September 25th in the next 66 days only 14% of the contract was performed is confirmation of continued waiver by the government of timely performance.

<sup>6</sup> Thus, in 1928, the government position under Article 9 is that put forward by the government as its possible position in 1944 in argument of *United States v. American Surety Company*, 322 U. S. 96, and summarized in the opinion of the Court. The petition, p. 12, urges the necessity of amplification of the *American Surety* opinion.

Finding 8<sup>7</sup> is completely ultimate in recital of correspondence between the government and contractors that establishes (a) government admission, on October 1st, within the contract period, of its inability to pay the due or subsequent monthly estimates<sup>8</sup> until Congress voted new appropriations; (b) the government proposal that the contractors agree to proceed forthwith upon their own resources and thus obviate issue of the otherwise necessary stop-order; (c) the counter proposal of the contractors and its acceptance by the government that the contractors would proceed to the extent of available resources and, upon their exhaustion, be entitled to the stop-order; (d) the subsequent government issue of the stop-order when the contractors had exhausted their resources.

This finding is submitted as establishing termination by the government of the contractor obligation or right to proceed with any further performance, and of all liability in liquidated damages—all consequent upon the default of the government upon its obligation to pay the monthly estimates, and its consent to and acceptance of substituted effort by the contractors.<sup>9</sup>

The third point is the lack of need for timely completion of the work in 150 days. Finding 4<sup>10</sup> is that the contract, at its execution on May 21, 1928, embraced construction of a stretch of highway, designated as a portion of Section D, Route 1, in the Sequoia National Park. Finding 7<sup>11</sup> is that the government section was reduced from 2.65 to 1.96 miles in length and eliminated the interval Clover Creek Bridge and its approaches. Finding 14<sup>12</sup> is that, on April 3, 1929,

<sup>7</sup> R. pp. 12, 13, 14; Petition p. 7.

<sup>8</sup> The same confessed inability under other National Park contracts to pay due estimates is declared to breach the contract *Shuler & McDonald v. United States*, 85 Ct. Cls. 631, *Joplin v. United States*, 89 Ct. of Cls. 345. Other citations in Petition, p. 13.

<sup>9</sup> *Phillips etc. v. Seymour*, 91 U. S. 646.

<sup>10</sup> R. p. 10, Petition p. 4.

<sup>11</sup> R. p. 12, Petition p. 5.

<sup>12</sup> R. p. 17, Petition p. 6.

nearly a year later, neither Section C previously completed by the contractors, nor Section D would be of any use until the government would provide three bridges preceding these sections, and would add 29 miles of road as additional to Section D.

These findings are submitted as evidencing that timely completion was not material because the pattern of improvements was inadequate, and that, without the necessity of timely completion, there could be no damages in that aspect either for liquidation or actual assessment. Consequently, the provision for liquidated damages is entirely penal.

Additional reasons for favorable discretion are that the Court of Claims decision is only reviewable by certiorari, and that the decision below is a cloud upon settled precedents applicable to the construction of government contracts and provisions for liquidated damages.

### ARGUMENT.

The above ultimate findings are submitted in themselves to show government waiver of timely performance, government termination of liquidated damages liability and government lack of damage for untimely performance due to its inadequate pattern of improvement. The findings are submitted to show material questions of law are involved in the decision below, which, ignoring said findings, holds the original liability for liquidated damages always remained in full effect.<sup>13</sup>

As a cloud upon settled precedents, the decision below affects the legal limitations upon liquidated damages. They

<sup>13</sup> The opinion (R. p. 23) distinguishes the present case from *American Surety Company* by statement that herein the government did not terminate the contract, but did terminate in the cited case, adding herein: "It probably would have been entitled to do so because of the contractors tardiness in performance. But it only issued a suspension order, and plaintiff after the suspension, resumed performance and completed the work."

are permitted where timely performance is of the essence of the contract as agreed compensation for the indefinite damages resulting from untimely performance that cannot otherwise be reasonably appraised. Consequently, they fall away if the contracted timely performance be waived or forfeited by breach,<sup>14</sup> or if the provision be only a spur or incentive to performance and not a measure of appreciable damages.<sup>15</sup> The precedents are that parties must each perform entirely their respective contract obligations precedent to insistence upon timely performance or alternative damages.<sup>16</sup> Consequently, any liability in liquidated damages is discharged where the government allows contractors to proceed to completion despite inexcusable delays so as not to forfeit mounting liquidated damages, and thus precludes prompt completion of needed structures.<sup>17</sup> Consequently, the contractors are relieved of all liability, either for further performance or for any liquidated damages, when the government defaults upon its obligation to pay due monthly estimates.<sup>18</sup> Article 9 expressly provides the liability for liquidated damages is only effective if the government does not terminate the right to proceed.<sup>19</sup>

The foregoing ultimate findings involve no mixed questions of law and fact; they are unaffected by the absence of underlying evidence; and they are paramount over any subordinate findings. They clearly raise the question of law whether the decision properly or erroneously disre-

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<sup>14</sup> This ignores that the refusal to pay estimates creates the right to abandon or to continue performance for completion in a reasonable time subject to actual damages (*Phillips v. Seymour*, supra), and that these contractor rights prevail over a subsequent termination (*Brooklyn etc. Co. v. United States*, 97 Ct. Cls. 532).

<sup>15</sup> *Priebe and Sons v. United States*, 322 U. S. 407.

<sup>16</sup> *Phillips etc. v. Seymour*, supra, Note 9.

<sup>17</sup> *United States v. American Surety Co.* supra, Note 6.

<sup>18</sup> *Commercial Casualty Co. v. United States*, 83 Ct. Cls. 376, Petition p. 13.

<sup>19</sup> *Supra*, Note 3.

garded them in holding the liquidated damages liability was always in effect.

In emphasis of the error below in the departure of the decision from settled precedent, it appears the decision may be cited as upholding a liability for liquidated damages:

I. Where the government consents to inexcusable delays that preclude timely completion.<sup>20</sup>

II. Where the government defaults upon its contract obligation to pay due monthly estimates to the contractor.

III. Where the government accepts substituted performance not provided for in the contract.

IV. Where the acts of the government disclose no need for timely performance and no basis for any damage.

V. Where there is no damage and the collection is penal or in terrorem.

Petitioner abides the further consideration of the petition herein by the Court.

Respectfully submitted,

ROBERT E. DINEEN, Superintendent  
of Insurance of the State of New  
York, as Liquidator of New York  
Indemnity Company,

By CAMDEN R. MCATEE,  
*Attorney for Petitioner.*

<sup>20</sup> The precedents contrary to these propositions are:

- I. *Phillips etc. v. Seymour, supra*, Note 9.
- II. *Myerle v. United States*, 33 Ct. Cls. 1, 25.
- III. *Phillips etc. v. Seymour, supra*, Note 9.
- IV. *Kothe v. Taylor Trust*, 280 U. S. 224.
- V. *Wise v. United States*, 249 U. S. 361, 365; *Priebe & Sons v. United States, supra*, Note 15.

**CERTIFICATE OF COUNSEL.**

The foregoing Petition for Rehearing is hereby certified as presented in good faith, and not for delay.

CAMDEN R. McATEE,  
*Attorney for Petitioner.*